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No. 97-6203

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATHANIEL JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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58 pp

QUESTIONS PRESENTED

This Court has limited its grant of certiorari to the following questions:

1. Does 18 U.S.C. 2119(1)-(3) describe sentencing factors or elements of the offense?

2. If 18 U.S.C. 2119(1)-(3) sets forth sentencing factors, is the statute constitutional?

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction but remanding for resentencing (J.A. 19-40) is reported at 60 F.3d 547. The court's opinion affirming the sentence imposed on remand (J.A. 41-43) is unreported, but the decision is noted at 116 F.3d 1487 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1997. The petition for a writ of certiorari was filed on September 25, 1997, and granted on March 30, 1998. The Court amended its order granting cer-

tiorari on April 6, 1998. 118 S. Ct. 1405. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

As in effect at the time of petitioner's offense, 18 U.S.C. 2119 (Supp. IV 1992) provided as follows:

§ 2119. Motor Vehicles

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.[1]

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[1] In 1994, Congress amended Section 2119 by substituting "with the intent to cause death or serious bodily harm" for "possessing a firearm as defined in section 921 of this title." Federal Death Penalty Act of 1994, Pub. L. No. 103-322, Tit. VI, § 60003(a)(14), 108 Stat. 1970. The question of the proper construction of the new intent requirement is before this Court in *Holloway* v. *United States*, No. 97-7164 (cert. granted, April 27, 1998). The 1994 amendment also authorized imposition of the death penalty in cases in which death results. 108 Stat. 1970. In 1996, Congress again amended Section 2119 to specify that the term "serious bodily injury" in subsection (2) includes certain sexual assaults. Carjacking Correction Act of 1996, Pub. L. No. 104-217, § 2, 110 Stat. 3020.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, petitioner was convicted of carjacking, in violation of 18 U.S.C. 2119 (Supp. IV 1992), and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1988 & Supp. IV 1992). The court of appeals affirmed petitioner's convictions, but it vacated the sentence originally imposed by the district court and remanded for resentencing. J.A. 19-40. On remand, the district court sentenced petitioner to 300 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. J.A. 41-43.

1. On December 7, 1992, petitioner and two co-defendants, Donovan Oliver and Darryl McMillan, drove petitioner's sister's Cadillac to the parking lot of a liquor store in Bakersfield, California. J.A. 19-20; Trial Tr. 159, 217-219, 453. The men approached a parked Honda Accord and ordered its occupants, Ali Nassar Mutanna and Abdullah Mardaie, to get out. J.A. 20; Trial Tr. 158-159, 387-388. Oliver stuck the barrel of a .45 caliber semi-automatic rifle into Mutanna's left ear, causing it to bleed profusely. J.A. 11, 20; Trial Tr. 159, 199, 223. Petitioner and McMillan then robbed the victims while Oliver held them at gunpoint. J.A. 20; Trial Tr. 160. Oliver took Mutanna behind the liquor store, ordered him to lie on the ground, and struck him on the head. Trial Tr. 165-166, 233-234. Oliver told Mutanna that he would kill him if he moved. *Id.* at 167; see J.A. 11, 20.

Oliver and McMillan drove away in the Cadillac. Trial Tr. 167-168. As they did so, Mutanna began to get up off the ground, and Oliver fired a shot in his direction from the departing Cadillac. *Id.* at 168, 225; Presentence Rep. (PSR) 4; see J.A. 11. Petitioner forced Mardaie into the Honda and drove after the Cadillac. Trial Tr. 167-169, 231-232, 390. After driving a short distance, petitioner ordered Mardaie out of the car. *Id.* at 391; J.A. 11, 20.

After petitioner and his co-defendants left, Mutanna flagged down a police car and showed the police officers the direction in which the carjackers had gone. Trial Tr. 168-169, 306. The police found petitioner sitting in the Honda, which he had parked a few blocks away. J.A. 20; Trial Tr. 308-309. Petitioner drove off as officers approached the Honda, but he was apprehended after a short chase when he crashed the Honda into a telephone pole. Trial Tr. 309-311. The officers later arrested Oliver and McMillan and seized the rifle used in the carjacking from the back seat of the Cadillac. *Id.* at 314-315, 356; J.A. 20-21.

2. A federal grand jury indicted petitioner, Oliver, and McMillan on charges of carjacking, in violation of 18 U.S.C. 2119 (Supp. IV 1992),[2] and using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1988 & Supp. IV 1992). J.A. 4-5. At petitioner's arraignment, the magistrate advised him that the maximum penalty for carjacking was 15 years' imprisonment. J.A. 7. At trial, Mutanna testified, among other things, that during the course of the carjacking Oliver had pushed the gun into Mutanna's ear until it started bleeding,

[2] Unless otherwise indicated, all references to Section 2119 in this brief are to the version in effect at the time of petitioner's offense.

that he (Mutanna) had "blood all over" him, and that Oliver repeatedly kicked him in the head as he lay on the ground. Trial Tr. 199, 223, 233-234. At the conclusion of the evidence, the jury was instructed that, in order to find the defendants guilty of carjacking, it must find that the defendants took a motor vehicle while possessing a firearm; that the vehicle had been transported, shipped, or received in interstate or foreign commerce; and that the defendants took the vehicle by force and violence or by intimidation. J.A. 10. The jury found each defendant guilty of both charges.[3] J.A. 21.

3. The presentence report prepared for petitioner's sentencing determined that the maximum term of imprisonment authorized for his carjacking offense was 25 years, because the offense resulted in "serious bodily injury" to a victim (Mutanna). PSR 22. The report explained that "[d]uring the carjacking, one of the victims * * * was struck in the left ear and was then forced to the ground at gunpoint," and that as a result, "the victim's ear swelled and was painful for several days." PSR 6. The report stated further that a medical examination of the victim some time after the carjacking revealed that he had suffered a perforated eardrum, causing permanent hearing loss. *Ibid.*; see also J.A. 11, 15-16, 33-34.[4]

At sentencing, petitioner argued that he could not be sentenced to more than the 15 years' imprisonment authorized by Section 2119(1) because the indictment

[3] Petitioner and his co-defendants were convicted in part on the theory that they aided and abetted each other in committing the charged offenses. J.A. 4-5, 19-20, 25-26; 18 U.S.C. 2.

[4] Copies of medical reports on Mutanna's condition were provided to petitioner's counsel before the sentencing hearing. J.A. 33-34; see 93-10779 C.A. App. 34-41.

had not charged, and the jury was not instructed that it must find, that the carjacking resulted in "serious bodily injury." See J.A. 12-13. The district court rejected that argument, holding that Section 2119(2) did not define a substantive offense separate from the offense defined by the initial paragraph of that Section. The court concluded, instead, that "carjacking is a single offense defined in Section 2119," and that "[sub]sections (1) through (3) are merely sentencing provisions to be applied by the district court at sentencing." J.A. 13; see 12/13/93 Tr. 32, 39. The court found that Mutanna had suffered serious bodily injury as the result of the carjacking, and that the 25-year maximum term of imprisonment authorized under Section 2119(2) therefore applied to petitioner's offense. J.A. 15-16. Based on its reading of the applicable provisions of the Sentencing Guidelines, the district court imposed the statutory maximum sentence for the carjacking offense. It then added a five-year consecutive sentence for the violation of Section 924(c), for a total sentence of 30 years' imprisonment. J.A. 21, 37-40; see 12/13/93 Tr. 41.

4. The court of appeals affirmed petitioner's convictions. J.A. 19-40. As relevant here, the court rejected petitioner's claim that the reference to "serious bodily injury" in 18 U.S.C. 2119(2) defined an element of a separate offense, which the government was required to charge in the indictment and prove at trial. J.A. 27-34. The court concluded, instead, that Section 2119 defines the crime of carjacking in its first paragraph and then sets out, in three subparagraphs, different maximum sentences based on the harm that results, in a particular case, from the commission of the offense. J.A. 28 30.

The court explained that "[t]he plain text of the statute establishes one offense, as defined in the first main paragraph[,] * * * followed by the word 'shall' and then three sentencing possibilities." J.A. 29. Because Congress "did not redefine the essential elements of carjacking in subparagraphs (1), (2) or (3), and those provisions could not stand alone, independent of the main paragraph," the court agreed with the Eleventh Circuit that "the natural reading of the text" was that "§ 2119 sets forth one offense, with several possible penalties." J.A. 28, 30. In addition, the court concluded that the legislative history of Section 2119 provided "persuasive evidence" that Congress intended clauses (1)-(3) of Section 2119 to "set forth enhanced penalties," not additional elements of separate aggravated offenses. J.A. 31-32.

The court rejected petitioner's claim that he had been denied due process because he was not informed through the indictment or at arraignment that he might face the maximum 25-year sentence. J.A. 33-34. The court noted that an indictment need not allege the existence of a sentencing factor, and that petitioner and his co-defendants were given a fair opportunity to contest the existence and relevance of "serious bodily injury" at sentencing. *Ibid.*

Although it affirmed petitioner's convictions, the court of appeals vacated his sentence, holding that the district court had erred in computing the maximum permissible combined penalty, under the Sentencing Guidelines, for petitioner's two offenses. J.A. 37-40.[5]

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[5] The court concluded that under Guidelines § 2K2.4, application note 2, petitioner's total sentence for both offenses should have been limited, in the circumstances of this case, to the 25-year (300-month) maximum specified in 18 U.S.C. 2119(2). J.A. 38-40.

On remand, the district court sentenced petitioner to 240 months' imprisonment on the carjacking count, and to a consecutive term of 60 months' imprisonment on the firearms count, for a total sentence of 300 months' imprisonment. 3/25/96 Tr. 5. The court of appeals affirmed. J.A. 41-43.

SUMMARY OF ARGUMENT

The carjacking statute, 18 U.S.C. 2119, sets forth one offense consisting of armed robbery of a motor vehicle, with three different maximum penalties depending on whether (1) no injury or no serious injury resulted from the crime, (2) serious bodily injury resulted from the crime, or (3) death resulted from the crime. 18 U.S.C. 2119(1)-(3). A finding of serious bodily injury resulting from the crime is a sentencing factor, not an element of a separate criminal offense. The contrary interpretation—that the injury finding is an offense element—is an unnatural textual reading of Section 2119's penalty provisions, and nothing in the Constitution requires that this Court adopt it.

I. This Court has repeatedly made clear that, within broad constitutional limits, the definition of the elements of federal crimes is a matter for Congress, not the courts. The initial question in this case is therefore one of legislative intent. The first paragraph of Section 2119 defines a single carjacking offense, while the succeeding three dependent clauses provide statutory authority to sentencing courts to impose higher sentences when particular harms to victims result from the offense. Comparison with other statutes confirms that Section 2119 differs from those in which Congress may have intended to create both a basic offense and separate aggravated crimes. Instead, Section 2119 resembles in its character and

structure provisions that are clearly intended to define one offense with various ranges of punishments depending on factors found at sentencing. The text and structure of the statute therefore strongly support the interpretation, confirmed by the legislative history and adopted by all the courts of appeals that have considered the question, that resulting "serious bodily injury" (or "death") is a sentencing determination, not an element of a separate offense.

The nature of the factors in question further supports that conclusion. Bodily harm to victims of a crime is, like recidivism, "as typical a sentencing factor as one might imagine." *Almendarez-Torres* v. *United States*, 118 S. Ct. 1219, 1224 (1998). The degree of physical harm caused by a crime is precisely the sort of factual circumstance that courts necessarily consider in imposing sentence. There is no reason to conclude that a statutory reference to resulting bodily harm was intended to define a new offense element, simply because any such harm will generally be closely related to the conduct that constitutes the offense.

Congress's 1994 amendment of Section 2119 to add the possibility of capital punishment in cases in which death results is not relevant to this case, which involves an earlier version of Section 2119, with no capital sentencing provision, and an enhancement based on serious bodily injury, not death. Even if the 1994 amendment were relevant, however, it would not require that the resulting injury factor set out in clause (2) be treated as an offense element. There is nothing to suggest, as a matter of statutory interpretation, that Congress intended the finding of resulting injury to be made by anyone other than the sentencing judge. Although petitioner argues that the

Constitution would require that result in capital cases after 1994, that is far from clear, and there is no reason for the Court to reach or resolve the question in this case.

If any subsequent history of Section 2119 is relevant here, it is Congress's 1996 amendment of the statute, which was a direct response to a judicial decision interpreting the term "serious bodily injury" not to include rape of the carjacking victim. In reacting to that interpretation, Congress focused specifically on the statutory provision at issue in this case, and the relevant materials make clear it understood and agreed that "serious bodily injury" is a factor relevant to the severity of sentencing, not an element of the carjacking offense.

Finally, because use of the standard tools of statutory interpretation leads to the conclusion that bodily injury and death are sentencing factors, not offense elements, the rule of lenity has no application in this case.

II. Nothing in the Constitution requires the Court to adopt any different construction of Section 2119, or to invalidate the statute if it is construed to create sentence-enhancement factors. In *Almendarez-Torres*, this Court upheld the constitutionality of a recidivist sentence enhancement provision that increased applicable maximum penalties. The Court's analysis of the constitutional question there applies equally in this case.

The overall sentencing range established by Section 2119, while somewhat broader than that at issue in *Almendarez-Torres*, fairly reflects the inherent seriousness of the carjacking crime and the risk of harm to persons inherent in it. The increases in the maximum prison sentences authorized by clauses (2)

and (3), while significant, are proportionally smaller than the enhancement upheld in *Almendarez-Torres*. And *Almendarez-Torres* cannot be validly distinguished on the ground that victim injury is constitutionally different from recidivism for these purposes. Both recidivism and harm are conventional sentencing factors.

Finally, there is no sound basis in the Constitution for concluding that, if facts related to the commission of the crime may increase the maximum sentence authorized by law, they must be established as "elements." At its broadest, such a proposed rule could be said to further the principle that any fact significantly affecting a defendant's sentence must be proved at trial in order to protect the defendant's right to trial by jury and to proof beyond a reasonable doubt. But that principle has been repeatedly rejected by this Court's cases, which recognize that many sentencing determinations that have a significant impact on the defendant's sentence may constitutionally be made by the sentencing judge under a preponderance-of-the-evidence standard. Petitioner's narrower argument that clause (1) sets a "statutory maximum" that clauses (2) and (3) may not increase fares no better, because it accords undue constitutional significance to the particular manner in which Congress elects to provide for graduated punishment based on the circumstances of the crime. Under this Court's decisions, Congress could authorize a maximum sentence of life imprisonment for carjacking, but direct that sentencing take place in accordance with mandatory guidelines promulgated by the Sentencing Commission, using the same criteria of serious injury or death to limit sentences to intermediate maximum terms of 15 and 25 years. There can

be no constitutional impediment to accomplishing the same result through the direct statutory guidance set out in Section 2119.

This is not to say that the Constitution places no limit on Congress's ability to define criminal offenses. Aside from explicit textual limitations, such as the Ex Post Facto Clause, the Court has noted that legislatures cannot seek to alter the definitions of traditional common-law offenses in ways that transgress "fundamental fairness." *Monge* v. *California*, No. 97-6146 (June 26, 1998), slip op. 6. Other constitutional principles, such as proportionality and the need for fair notice of criminal prohibitions, also constrain a legislature's power. Such principles must be applied with restraint in order to avoid trenching on legitimate legislative prerogatives. There is no need for the Court to address those issues in this case, however, because the offense-definition and sentencing structure that Congress adopted in Section 2119 for armed carjacking fairly defines a serious violent crime and provides a reasonable structure for punishing those who commit it. The Constitution requires nothing more.

ARGUMENT

I. SECTION 2119 DEFINES A SINGLE FEDERAL CRIME WITH THREE SENTENCING PROVISIONS

Congress creates federal crimes by specifying that certain acts, generally accompanied by a particular mental state, will constitute a criminal offense. The specified acts and mental state become, by definition, the "elements" of the offense. In order for a defendant to be convicted of that offense, a grand jury must allege in an indictment, and the government must

prove beyond a reasonable doubt at trial, facts sufficient to establish the existence of each such element. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 117 (1974); *In re Winship*, 397 U.S. 358, 364 (1970).

Congress must also specify, in one way or another, what punishment may be imposed on an individual who has been found guilty of a given crime. Historically, Congress often simply set out a range of possible penalties for a defined offense, leaving the selection of specific punishments within that range to the broad discretion of the trial judge. See, *e.g.*, 18 U.S.C. 408a (1940) (kidnapping punishable by death or "imprisonment in the penitentiary for such term of years as the court in its discretion shall determine"); see generally *Mistretta* v. *United States*, 488 U.S. 361, 363-366 (1989) (describing historical practice). More recently, Congress has required the use of detailed Sentencing Guidelines, which are set out separately from the provisions that define offenses and are "designed to channel the sentencing discretion of the district courts and to make mandatory the consideration of factors that previously would have been optional." *Witte* v. *United States*, 515 U.S. 389, 402 (1995); see generally 18 U.S.C. 3553(b); 28 U.S.C. 994; *Mistretta*, 488 U.S. at 367-370. In addition, Congress has, with respect to some crimes, provided specific statutory guidance for the selection of appropriate sentences within a broad overall range of possible penalties—typically, by specifying minimum or maximum sentences that the court must or may impose, depending on the presence or absence of specified aggravating or mitigating factors. *E.g.*, 8 U.S.C. 1326(b) (Supp. II 1996); 18 U.S.C. 831(b), 2261(b) (1994 & Supp. II 1996); 21 U.S.C. 841(b) (1994 & Supp. II 1996); see *Almendarez-Torres* v. *United States*, 118 S. Ct. 1219 (1998).

Thus, Congress typically defines the elements of a crime, specifies a range of permissible penalties, and then permits or requires the sentencing court to consider a wide variety of potentially relevant facts or circumstances, apart from the elements of the offense itself, in determining what sentence to impose in a given case. See also 18 U.S.C. 3553(a) (setting out general factors to be considered at sentencing). A court may consider such "sentencing factors" in the exercise of its traditional discretion, in accordance with the Sentencing Guidelines, or by direction of the very provision that defines the offense of conviction. However the court comes to consider them, sentencing factors need not be charged in the indictment or proved at trial, and the requirements of due process are generally satisfied so long as the defendant is given a fair opportunity to be heard at sentencing and the court resolves any contested factual issues according to the preponderance of the evidence before it. See, *e.g.*, *United States* v. *Watts*, 117 S. Ct. 633, 635-638 (1997) (per curiam); 18 U.S.C. 3661; Sentencing Guidelines § 6A1.3, commentary.

This Court has repeatedly made clear that, within broad constitutional limits (see generally pages 36-50, *infra*), the definition of the elements of federal crimes is a matter for Congress, not the courts. *Almendarez-Torres*, 118 S. Ct. at 1223; *Staples* v. *United States*, 511 U.S. 600, 604 (1994); *Liparota* v. *United States*, 471 U.S. 419, 424 (1985); *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812) (there is no federal common law of crimes). For that reason, the question whether a particular act, status, or result mentioned in a federal criminal statute—in this case, the result of "serious bodily injury"—is an element of the defined offense or a statutory sentencing factor is

preeminently a question of congressional intent. Like other matters of statutory interpretation, it may be resolved by considering the "language, structure, subject matter, context, and history" of the provision in question. *Almendarez-Torres*, 118 S. Ct. at 1223.

A. The Language And Structure Of Section 2119 Create A Single Carjacking Offense With Graduated Punishments

The language and structure of Section 2119 indicate that Congress intended to define a single crime of carjacking—*i.e.*, armed robbery of a motor vehicle—while providing discretion to sentencing courts to impose greater punishment where the crime produces greater harms. The opening paragraph of the text defines the elements of the offense: possession of a firearm, taking a motor vehicle that has a nexus to interstate commerce, "from the person or presence of another," "by force and violence or by intimidation." That paragraph ends with the word "shall," followed by a dash. The remaining three dependent clauses, separated by commas and joined by the word "and," have to do only with sentencing: each provides for a different maximum term of imprisonment, from 15 years to life, depending on the degree of bodily harm that "results" from commission of the offense just defined. In other words, the sentencing clauses divide the overall range of authorized penalties into statutory sub-ranges, varying the severity of permissible punishment according to the bodily harm suffered by victims of the offense.

None of Section 2119's subsidiary clauses stands on its own as a defined offense; each depends entirely on the initial paragraph to identify the criminal conduct that gives rise to punishment. Conversely, the initial paragraph does stand on its own as a definition of pro-

hibited conduct; the three dependent clauses are relevant only to sentencing, at which stage they define what penalties Congress has authorized for the defined offense, and how their severity varies depending on the particular consequences of the crime. As every court of appeals that has considered the matter has concluded, Section 2119 does not create three substantive offenses, each with separate elements and penalties. Rather, the statute's "structure is integrated, and [its] provisions form a seamless whole," defining one offense with three possible authorized sentencing ranges. *United States* v. *Rivera-Gomez*, 67 F.3d 993, 1000 (1st Cir. 1995); see also *ibid.* ("most natural and sensible" to read Section 2119 as creating only one offense); J.A. 28-29 ("The plain text of the statute establishes one offense."); *United States* v. *Williams*, 51 F.3d 1004, 1009-1010 (11th Cir.) (statute's "plain language and structure clearly indicate" that it defines only one offense with associated sentencing factors), cert. denied, 516 U.S. 900 (1995).

To identify three offenses in the text of Section 2119, the statute's three penalty clauses would have to be read as alternative completions for the offense definition begun in the initial paragraph; each completed alternative, taken as a whole, would then be read to define a separate criminal offense. That construction of the text, however, departs from the general approach employed by Congress in defining separate offenses. Congress does not typically define an offense by listing a number of its elements, adding the verb "shall," and then interposing a final offense element before specifying the range of authorized punishments. Moreover, if the penalty clauses were meant to be alternative completions for the first paragraph, rather than complementary subdivisions of an

overall sentencing range, then they would more naturally be joined by the disjunctive "or" than by the conjunctive "and" that Congress actually used in drafting Section 2119.

If Congress had intended the bodily injury and death factors in clauses (2) and (3) to be elements of separate substantive offenses, it would likely have set them out in more conventional offense-defining language. In 18 U.S.C. 2113 (1994 & Supp. II 1996), for example, subsections (a)-(c) define bank robbery and related offenses, each with its own penalty provisions. Subsections (d) and (e) then create separate aggravated forms of these offenses, by providing that "Whoever, in committing" one of the previously defined offenses, also commits assault, or jeopardizes a life, or kidnaps or kills another, "shall" be subject to specified punishments. Moreover, in setting out additional offense elements, subsections (d) and (e) use the active language of commission that is most often associated with the definition of prohibited conduct: "assaults any person," "puts in jeopardy the life of any person," "kills any person," "forces any person to accompany him." See also 18 U.S.C. 2114(a) ("and if in effecting * * * such robbery he wounds the person[,] * * * or for a subsequent offense, shall be imprisoned" etc.); 18 U.S.C. 2118(c)(1) ("Whoever in committing any offense [previously defined] assaults any person, or puts in jeopardy the life of any person, by the use of a dangerous weapon * * * shall be fined" etc.). By contrast, the passive language of "result[]" found in Section 2119's sentencing clauses suggests that in drafting those clauses Congress was focusing, not on additional conduct that would be the subject of a supplementary prohibition, but on graduating the punishment for carjacking by reference to

the degree of harm caused by a particular defendant's conduct.

These comparisons show that Section 2119 is not written like other statutes in which Congress may have intended to create separate aggravated forms of a basic offense. Furthermore, comparison with two other statutes cited by petitioner (see Br. 13), 8 U.S.C. 1324(a) (1994 & Supp. II 1996) and 18 U.S.C. 247 (1994 & Supp. II 1996), shows that Section 2119 *is* structured very much like statutes that all would agree set out only sentencing factors. In both Section 247 and Section 1324(a), an initial paragraph defining the elements of an offense concludes with the phrase "shall be punished as provided in" and the specification of a different subsection. That subsection, in turn, provides sub-ranges that are graduated according to, among other things, whether bodily injury or death results from the commission of the previously defined offense. See 8 U.S.C. 1324(a)(1)(A) and (B) (Supp II 1996); 18 U.S.C. 247(a) and (d). Petitioner relies (Br. 13) on the fact that in drafting these two statutes Congress formally separated the subdivision dealing with sentencing factors from the subdivision that defines the elements of the offense, whereas in drafting Section 2119 it set one directly after the other, omitting transitional phrases and failing to designate the initial paragraph as subsection (a) and the sentencing clauses as subsection (b). That circumstance, however, does not outweigh the fundamental structural similarity that all of these statutes share: each sets forth offense conduct in one paragraph, followed by separate sections with penalty-enhancing harms graduated by severity.[6]

[6] Congress may express an intention to create sentencing factors even without dividing a provision into separate sections, as it did in Section 2119(1)-(3). For example, 18 U.S.C. 1347 defines health care fraud in its first sentence, and in a second sentence provides escalating maximum sentences "[i]f the violation results in serious bodily injury" or "death." It would be unduly formalistic to suppose that the failure to divide Section 1347 into "(a)" and "(b)," labeled "offense" and "penalties," demands that courts must overlook the clear intention to create one offense with increasing maximum punishment based on sentencing factors.

For all these reasons, petitioner is mistaken when he contends (Br. 11) that Section 2119's language and structure provide "no reliable indicia" of Congress's intent. To the contrary, considered both in isolation and in comparison to other criminal statutes, the statute's language and structure strongly support the conclusion reached by the court below (and other courts of appeals) that resulting injury or death is a matter for determination at sentencing. It is true, of course, that Section 2119 does not "expressly state" that injury is "not an element" (Pet. Br. 11-12), and that the injury factor does not, for example, appear in a separate subsection entitled "penalties" (Pet. Br. 12-13). Every statute must be examined on its own terms, however, and the presence or absence of any one feature will seldom be dispositive.[7] Similarly, petitioner's observation that different statutes take

[7] See, *e.g.*, 18 U.S.C. 2332 (1994 & Supp. II 1996) (titled "Criminal penalties," but clearly defining a number of substantive offenses); *United States* v. *Ryan*, 9 F.3d 660, 668 (1993) ("death results" is a sentencing factor under the federal arson statute, 18 U.S.C. 844(i), although statute "lacks some of the common indicia" of a sentencing provision), modified on other grounds, 41 F.3d 361 (8th Cir. 1994) (en banc), cert. denied, 514 U.S. 1082 (1995); *United States* v. *Rumney*, 867 F.2d 714, 717-718 (1st Cir.) (former 18 U.S.C. App. 1202(a)(1) (1982) was a sentencing provision, despite absence of "indicia of a traditional sentence enhancer"), cert. denied, 491 U.S. 908 (1989).

account of bodily injury in different ways (Br. 14) simply underscores that determining the proper construction of any given provision will often require "a close reading of the text, as well as consideration of other interpretive circumstances." *Almendarez-Torres*, 118 S. Ct. at 1224. In this case, that inquiry leads to the conclusion that clauses (2) and (3) of Section 2119 set out factors to be taken into account at sentencing.

B. The Legislative History Of Section 2119 Supports The One-Offense Construction

The history of Section 2119's drafting and enactment is consistent with the conclusion that it defines one offense with different possible sentencing ranges. The Anti Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384, was first introduced as H.R. 4542. That bill would have enacted a new Section 2119 providing, in its entirety:

> Whoever, by force and violence, or by intimidation, takes a motor vehicle from the person or presence of another, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

H.R. 4542, 102d Cong., 2d Sess. § 101(a) (1992) (as introduced). The House Judiciary Committee amended the bill to require that the offender possess a firearm and that the vehicle taken have previously moved in interstate commerce, and to reduce the maximum authorized term of imprisonment to 15 years. H.R. Rep. No. 851, 102d Cong., 2d Sess. Pt. 1, at 1-2, 17 (1992) (House Rep.). The Committee observed that, as so amended, "[t]he definition of the offense track[ed] the language used in other federal

robbery statutes (18 U.S.C. §§ 2111, 2113 and 2118)." *Id.* at 17.[8]

The House Committee on Energy and Commerce, to which H.R. 4542 was sequentially referred, amended the Judiciary Committee's version of the bill to create the present three-tiered penalty structure. See House Rep., Pt. 2, at 2, 14. The Committee explained that its amendment "increas[ed] the maximum prison term for carjacking to 25 years, instead of 15 years as in the Judiciary bill, when carjacking results in bodily injury. If death results, the penalty could be life in prison and a fine." *Id.* at 14; see also *id.* at 32 (evidently describing a somewhat different version of the Committee's amendment). The final bill that became the Anti Car Theft Act contained this amended version of the provision creating Section 2119. See 106 Stat. 3384; see also 138 Cong. Rec. H11820 (daily ed. Oct. 5, 1992) (final bill was a "compromise" be-

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[8] Given the Judiciary Committee's statement that it used other federal robbery statutes as its model for the portion of Section 2119 that defines the elements of carjacking, petitioner's reliance on supposed state-law precedents (Pet. Br. 24-26, A1-A14) is largely misplaced. Although, as described in the text, the statute's references to bodily injury and death were added by a different Committee, nothing in the language, structure, or history suggests that in adding them Congress might have abandoned ready federal models, such as those discussed in the previous section, in favor of generalized reliance on the state law of assault. In any event, had Congress looked to the state laws petitioner cites, and intended to emulate them, it would presumably have made injury or death "an element of an offense of aggravated robbery or of robbery in the first degree," probably "set forth in a separate statutory section * * * and classified as a different class of felony." Pet. Br. 24-25. That is not, of course, what Congress did in Section 2119. Cf. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 90 (1986).

tween versions reported by Judiciary and Commerce committees).

The Energy and Commerce Committee did not describe its enhanced penalty provisions as "sentencing factors," or discuss whether the relevant "results" of the crime would be determined by the jury or by the sentencing judge. The brief comments in its report, and elsewhere in the legislative history, nonetheless uniformly suggest that the amendment was intended to create and grade a scheme of enhanced penalties, not to alter or supplement the elements of the underlying carjacking offense as it had been defined by the Committee on the Judiciary. See House Rep., Pt. 2, at 14 (bill as reported "contains provisions which include *a* new Federal crime for armed 'carjacking'") (emphasis added); see also, in addition to comments cited *supra*, House Rep., Pt. 3, at 2 (Ways and Means Committee) ("With respect to the theft of automobiles, *a* new Federal crime is defined for armed carjacking") (emphasis added); 138 Cong. Rec. H11820 (daily ed. Oct. 5, 1992) (statement of Rep. Dingell, Chair of the Energy and Commerce Comm.) ("I am pleased that we have agreed to toughen the penalties against carjacking as contained in the Commerce Committee version."); *ibid.* (statement of Rep. Collins) ("This bill would make carjacking a Federal crime with tough penalties, including a sentence of up to life in prison if carjacking results in death"). Thus, to the extent it speaks to the issue at hand, the history of Section 2119 supports the natural reading of the statutory text: Congress intended to establish a single crime of carjacking, defined in the initial paragraph of the provision, and to provide a graduated set of penalties, with significantly greater punishment authorized in those cases in which

commission of the crime results in serious bodily injury or death. Compare *Almendarez-Torres*, 118 S. Ct. at 1226.

C. The Bodily Harm That Results To Victims Is A Traditional Factor In Determining The Severity Of Criminal Sentences

As petitioner observes (Br. 15), this Court made clear in *Almendarez-Torres*, 118 S. Ct. at 1224, that the nature or subject matter of a particular statutory factor may be important in assessing whether Congress intended that factor to help define a separate, aggravated form of an offense, or simply to be taken into account in determining the sentence to be imposed for the basic crime. Like the recidivism factor at issue in *Almendarez-Torres*, the question of victim harm—whether a given robbery, for instance, not only involved the intimidation and loss of property that the law directly prohibits, but also led to the serious injury or death of a victim—is "as typical a sentencing factor as one might imagine." *Ibid.*; see also *id.* at 1229-1230.

Judges have always taken into account, in the exercise of their traditional discretion in imposing sentence, the amount of harm caused by a defendant's crime, and more particularly whether it resulted in a victim's injury or death. See, *e.g.*, *Payne* v. *Tennessee*, 501 U.S. 808, 820 (1991); *Williams* v. *Oklahoma*, 358 U.S. 576, 585-586 (1959) ("In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime. * * * Certainly, one of the aggravating circumstances involved in this kidnapping crime was the fact that petitioner shot and killed the victim in the course of its commission."). Indeed, the United

States Sentencing Commission, in drafting the present federal Sentencing Guidelines, expressly recognized that for crimes like robbery and assault, "the presence of physical injury made an important difference in pre-guidelines sentencing practice." Guidelines ch. 1, pt. A, ¶ 4(b), at 6 (Nov. 1, 1997).[9] The Guidelines preserve and regularize traditional practice, requiring courts to take account of "all harm that resulted" from the defendant's conduct, including "bodily injury," in determining a defendant's offense level. Guidelines § 1B1.3(a)(3) & application note 4; see also, *e.g.*, §§ 2A2.2(b)(3) (aggravated assault); 2A4.1(b)(2) (kidnaping, abduction, unlawful restraint); 2B3.1(b)(3) (robbery); 2B3.2 (extortion); *Miller* v. *Florida*, 482 U.S. 423, 426 (1987) (discussing state sentencing guidelines that assigned "points" based on factors including "the primary offense, * * * prior

[9] See also, *e.g.*, W. Rhodes & C. Conly, *Analysis of Federal Sentencing* X-13, XV-5, XV-11—XV-13 (U.S. Dep't of Justice, Fed. Justice Research Prog. Rep. No. FJRP-81/004, 1981) (indicating that, in an empirical study of federal sentencing decisions, victim harm significantly influenced the length of prison sentences for bank robbery and a group of other federal crimes); 28 C.F.R. 2.20 (1984) (former Parole Commission guidelines, taking resulting injury into account in grading the seriousness of, *e.g.*, assault (ch. 2(B)) and crimes primarily involving the destruction of property (ch. 3(A))); S. Shane-Dubow et al., *Sentencing Reform in the United States: History, Content, and Effect* 233, 235-236 (Nat'l Inst. of Justice 1985) (reporting that in a study of South Carolina judges, who had "a wide range of discretion in determining the type and length of sentence," "the two most important factors used by judges * * * were the use of a weapon and the threat of personal injury"); Model Penal Code § 7.01(2)(a) (Official Draft 1962) (listing, as the first consideration supporting withholding any prison sentence, whether "the defendant's criminal conduct neither caused nor threatened serious harm").

record, * * * and victim injury"). There can be no serious question that resulting injury or death is, like recidivism, "a traditional * * * basis for a sentencing court's increasing an offender's sentence." *Almendarez-Torres*, 118 S. Ct. at 1230.

Petitioner contends (Br. 15-19) that resulting injury should nonetheless be treated as an offense element under Section 2119 because the existence of such an injury, unlike an offender's criminal history, is an issue "closely related to and intertwined with the facts of the [present] offense" (Br. 17). Furthermore, he argues (Br. 16-18), there is greater need to treat bodily injury as an element, because it is more likely to be contested than a defendant's criminal history, and it will typically not have been the subject of a prior criminal proceeding, conducted under more stringent rules of proof. Those considerations do not, however, support the conclusion that Congress intended bodily harm to be an offense element under Section 2119, because statutory and guideline-based sentencing schemes frequently require that "fact[s] associated with the commission of the crime" (Pet. Br. 15), including resulting injury or death, be taken into account as sentencing factors.[10]

In *McMillan* v. *Pennsylvania*, 477 U.S. 79, 81 (1986), for example, the Court considered a state law

[10] Conversely, a factor relating solely to the "history of the offender" (Pet. Br. 15) may be an element of an offense. The statute that was at issue in *Almendarez-Torres*, for example, requires the government to prove that the defendant was previously "arrested and deported or excluded and deported." 8 U.S.C. 1326(a)(1) (Supp. II 1996). See also 18 U.S.C. 922(g) (1994 & Supp. II 1996) (specifying various historical facts, such as prior convictions, commitment to a mental institution, dishonorable military discharge, or renunciation of citizenship, that trigger federal criminal firearms prohibitions).

that mandated the imposition of a minimum term of imprisonment if the judge found at sentencing that the defendant had "'visibly possessed a firearm' during the commission of the offense." Rejecting a claim that the Constitution required the use of a heightened standard of proof "because visible possession is a fact 'concerning the crime committed' rather than the background or character of the defendant," the Court observed that "[s]entencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime without suggesting that those facts must be proved beyond a reasonable doubt." *Id.* at 92 (citation omitted).

McMillan cited *Proffitt* v. *Florida*, 428 U.S. 242 (1976), which involved a capital sentencing scheme in which the sentencing judge was required to take account of various aggravating and mitigating circumstances, many of them "intertwined with the facts of the offense" (Pet. Br. 17). *McMillan*, 477 U.S. at 92; see *Proffitt*, 428 U.S. at 248-249 n.6. Similar examples are easily multiplied. See, *e.g.*, Guidelines § 1B1.3(a)(1)-(2) (requiring consideration at sentencing of all offense-related conduct); *Miller*, 482 U.S. at 426 (describing state guidelines scheme); 18 U.S.C. 3592 (1994 & Supp. II 1996) (specifying aggravating and mitigating factors for federal capital sentencing, including, for instance, that a killing "involved torture or serious physical abuse"); 21 U.S.C. 841(b) (1994 & Supp. II 1996) (specifying different sentencing ranges for drug trafficking offenses depending on the type and quantity of drugs involved); Pet. Br. 12-13 (citing several federal criminal statutes that use serious bodily injury as a sentencing factor). The degree of

physical harm caused by a defendant's crime is precisely the sort of factual circumstance that courts "necessarily consider" (*McMillan*, 477 U.S. at 92) in imposing sentence. There is no reason to conclude that a statutory reference to resulting bodily harm in specifying maximum authorized punishments was intended to define a new offense element, simply because such harm will generally follow directly from the conduct that constitutes the offense of conviction.

Significantly, Section 2119 does not refer to bodily injury or death as an integral consequence of the defendant's offense conduct, as would a hypothetical statute that read: "Whoever, in the course of taking a motor vehicle, causes serious bodily injury to the occupant." As we have pointed out (see pages 17-18, *supra*), clauses (2) and (3) of Section 2119 instead authorize the imposition of higher sentences if serious bodily harm or death "results." That language focuses not on the offender's acts, but on their consequences.[11] It indicates that in this statute, injury or death is a harm to be considered at sentencing, not a separately prohibited aspect of the underlying criminal conduct.

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[11] For example, a carjacking victim might suffer a heart attack immediately after the offender drove away, or become disoriented, wander into traffic, and be hit by another car. Such consequences are readily encompassed by a sentencing provision tied to resulting harms, even if they are not intertwined with the offense conduct itself. See *United States* v. *Vazquez-Rivera*, 135 F.3d 172, 178 (1st Cir. 1998) ("[T]he choice of the word 'results' * * * suggests that Congress intended to cover a fairly broad range of consequences flowing from a carjacking.").

D. To The Extent They Are Relevant, Later Amendments To Section 2119 Also Support The One-Offense Construction

1. *Provision for capital punishment.* Petitioner argues (Br. 26-30) that resulting bodily injury must be construed to be an element of an aggravated offense defined by clause (2) of Section 2119 because in 1994, after the commission of the offense at issue in this case, Congress amended clause (3) of the statute to authorize imposition of the death penalty in cases in which "death results." See note 1, *supra* (describing 1994 amendments); see also Br. for the Nat'l Ass'n of Criminal Defense Lawyers (NACDL) 14-15. That argument is unsound. The penalty structure of Section 2119 applicable to this case was already in place before a capital sentence was added. The 1994 amendment of clause (3) is not the sort of legislative modification that may shed light on the proper interpretation of clause (2), as originally enacted: it does not "declare the meaning of earlier law," "seek to clarify an earlier enacted general term," "depend for [its] effectiveness upon clarification, or a change in the meaning of an earlier statute," or otherwise "reflect any direct focus by Congress upon the meaning of the earlier enacted provisions." *Almendarez-Torres*, 118 S. Ct. at 1227 (citing cases). The 1994 amendment is therefore "beside the point" here. *Ibid.*

Even if the 1994 amendment were potentially relevant to interpreting the statute under which petitioner was convicted and sentenced, it would not justify the conclusion that the non-capital sentencing provision in clause (2) was intended to create a separate criminal offense. First, Congress's 1994 addition of the words "or sentenced to death" to the range of penalties authorized by clause (3) for cases in which

"death results" does not indicate any intent to make resulting death an element of a separate carjacking offense (let alone any similar intent with regard to the "serious bodily injury" covered by clause (2)). Indeed, the portion of the 1994 amendment that *did* change the elements of the carjacking offense operated by substituting a new intent requirement for the former element of "possessing a firearm"—which appears in the initial, offense-defining paragraph of the statute. That change applies to all carjacking cases, not only to those in which death results. See Federal Death Penalty Act of 1994, Pub. L. No. 103-322, Tit. VI, § 60003(a)(14), 108 Stat. 1970. The 1994 amendments therefore preserve and emphasize the structural separation between the offense elements set out in the initial paragraph of Section 2119 and the sentencing factors set out in the following dependent clauses.

Second, contrary to petitioner's argument (Br. 27-28), nothing in the relationship between Section 2119, as amended, and the capital sentencing procedures that Congress also enacted in 1994, 18 U.S.C. 3591 *et seq.*, requires the conclusion that resulting injury in clause (2) should be treated as an element of a separate carjacking offense. The federal death penalty procedures apply whenever a defendant "has been found guilty of * * * any * * * offense for which a sentence of death is provided" (§ 3591(a)), if the government seeks the death penalty (see § 3593(a)) and if the sentencing jury or court makes certain required threshold findings concerning the defendant's mental state (see §§ 3591(a)(2)(A)-(D), 3593(b)). Those procedural provisions do not bear on the definition or construction of the elements of particular capital offenses; they simply provide a uniform mechanism for

determining whether or not to impose the death penalty in cases in which it is otherwise authorized. In this case, the basic language and structure of Section 2119, including the reference to resulting death in one of three dependent clauses relevant only to sentencing, was in place *before* the 1994 amendments added the possibility of capital sentencing. There is no reason to suppose that Congress intended those amendments to change the proper interpretation of Section 2119, or of any other statute that previously used resulting death as a factor relevant to the imposition of non-capital sentences.[12]

Finally, petitioner suggests (Br. 26-27) that resulting "death" must be a separate offense element after the 1994 amendments, because Congress's authorization of the death penalty in Section 2119(3) would otherwise be unconstitutional. He further suggests that if that constitutional claim is correct, it justifies construing Section 2119(2), even before 1994, to create a separate bodily-injury element. That constitutional theory of capital sentencing affords no basis for construing the resulting "serious bodily injury" factor to be an offense element.

[12] *United States* v. *Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998), petition for cert. pending, No. 97-9019 (filed May 7, 1998), is not to the contrary. See Pet. Br. 27-28 & n.24. *Rezaq* held that resulting death was an element of the air piracy offense defined by 49 U.S.C. App. 1472(n) (1988) (since revised and recodified at 49 U.S.C. 46502(b)). See 134 F.3d at 1134-1137. In reaching that conclusion, the court relied on the specific relationship between Section 1472(n) and 49 U.S.C. App. 1473(c)(2) (1988), a simultaneously enacted provision setting forth capital sentencing procedures applicable only in air piracy cases (although similar in kind to those now generally applicable under 18 U.S.C. 3591). See 134 F.3d at 1137. The court specifically distinguished resulting-death provisions in other statutes, including Section 2119. See 134 F.3d at 1136-1137 (citing *United States* v. *Rivera-Gomez*, *supra*, and *United States* v. *Williams*, *supra*).

While the Court has made clear that the death penalty may not be imposed on a robber or rapist "who, as such, does not take human life," *Enmund* v. *Florida*, 458 U.S. 782, 797 (1982); *Coker* v. *Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion), this Court's decisions have not addressed whether the Constitution would permit the imposition of a death sentence for a violent crime that results in a victim's death, where the finding of death is a sentencing factor that is determined by the jury beyond a reasonable doubt in the penalty stage of a bifurcated trial. Many of the constitutionally required determinations for imposing a capital sentence, however, may be made at the penalty stage. A defendant's participation in the crime resulting in death must be sufficiently substantial, for example, and his mental state sufficiently culpable, to make death a constitutionally proportionate punishment. *Tison* v. *Arizona*, 481 U.S. 137, 149-152, 156-158 (1987); *Enmund*, 458 U.S. at 797-801. But such findings of participation and culpability may be made at sentencing; they "do not affect the showing that [the government] must make at a defendant's *trial*," because they "do[] not concern the guilt or innocence of the defendant * * * and do[] not affect the * * * definition of any substantive offense." *Hopkins* v. *Reeves*, No. 96-1693 (June 8, 1998), slip op. 11.[13]

[13] See also *Cabana* v. *Bullock*, 474 U.S. 376, 384-388 (1986) (finding of intent to kill must be made "at some point in the process," but need not be made at trial or by jury); *Walton* v. *Arizona*, 497 U.S. 639, 649 (1990) (aggravating circumstances need not be denominated as elements of an offense, and need not be found by jury); *Hildwin* v. *Florida*, 490 U.S. 638, 640-641

The applicability of that constitutional analysis to the finding of a resulting death under the post-1994 version of Section 2119 is an open question. Certainly, the substantiality of a defendant's participation in a carjacking from which death resulted, and the culpability of his mental state, would have to be found before he could be sentenced to death, but the Eighth Amendment permits those findings to be made at sentencing.[14] This Court has never considered, however, whether the resulting death that is necessary to make capital punishment constitutionally proportional to a violent felony like rape or robbery must itself be treated as an element of the offense of conviction where the government seeks the death penalty.

This case presents no such constitutional issue. Petitioner's sentence is one of imprisonment, and it was enhanced for resulting serious bodily injury (not death) under Section 2119(2) (not (3)). The Court should not reach and determine the Eighth Amendment requirements for imposing a capital sentence

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(1989) (discussing *McMillan* v. *Pennsylvania*, *supra*); *Spaziano* v. *Florida*, 468 U.S. 447, 457-467 (1984); *Almendarez-Torres*, 118 S. Ct. at 1232 (citing these cases in rejecting argument that Constitution requires any factor that provides the legal predicate for an increased sentence to be treated as an offense element).

[14] After the 1994 amendments, the requirement of mental culpability would normally be satisfied by the jury's finding that a defendant acted "with the intent to cause death or serious bodily harm." See 18 U.S.C. 2119 (1994 & Supp. II 1996). In any case, applicable federal capital sentencing procedures would require the sentencing jury or court to find, beyond a reasonable doubt, that the defendant acted with a sufficiently culpable mental state, and that the victim died as an intended or "direct" result of the defendant's conduct. 18 U.S.C. 3591(a)(2)(A)-(D); see *Tison*, 481 U.S. at 157-158.

for carjacking under Section 2119(3) in the abstract; and however the existence of any doubt on that score might affect the interpretation of Section 2119(3) in a capital case, it can have no effect on the construction of Section 2119(2) here. Compare *Peretz* v. *United States*, 501 U.S. 923, 936 (1991).

2. *Modification of the definition of "serious bodily injury."* Although the 1994 amendment does not bear on the proper construction of Section 2119 before that amendment (and would not support petitioner's position even if it did), there is a later amendment to Section 2119 that does meet *Almendarez-Torres*'s criteria for potential relevance (see page 28, *supra*). That amendment, which clarified the specific penalty enhancement provision at issue in this case, supports the court of appeals' construction of the statute.

In June 1994, Reynaldo Vazquez Rivera forced a woman into her car, took her to a remote beach, and raped her at gunpoint before driving off with her car. *United States* v. *Rivera*, 83 F.3d 542, 544 (1st Cir. 1996). After a jury found Rivera guilty of violating Section 2119, the judge sentenced him to 25 years' imprisonment, based on his finding that the rape constituted "serious bodily injury." *Id.* at 545. The First Circuit affirmed Rivera's conviction, but it vacated his sentence on the ground that rape did not, by itself, constitute "serious bodily injury" under the statute, and that there was insufficient evidence to conclude that the rape had caused "extreme physical pain" or "protracted loss or impairment of the function of a * * * mental faculty." *Id.* at 547-549. The court's opinion explicitly adverted to its previous holding that "the alternative penalty provisions of § 2119 are sentence enhancers whose applicability is a matter for the judge, not the jury." *Id.* at 549 n.12.

The court of appeals rendered its decision in *Rivera* on May 21, 1996. 83 F.3d at 542. On June 19, 1996, Representative Conyers introduced legislation that became the Carjacking Correction Act of 1996, Pub. L. No. 104-217, 110 Stat. 3020, in order "to clarify that rape constitutes a serious bodily injury for the purposes of the penalty enhancement provided for in the federal carjacking statute." H.R. Rep. No. 787, 104th Cong., 2d Sess. 2 (1996); see note 1, *supra* (describing 1996 amendment); 142 Cong. Rec. H6531 (daily ed. June 19, 1996) (introduction of H.R. 3676). The committee report and floor statements on the Act focused directly on the First Circuit's interpretation of Section 2119, and they speak exclusively of sentence enhancement: there is no suggestion that the finding of serious bodily injury constituted an "element" of the carjacking offense, to be found by the trial jury rather than by the sentencing judge. See, *e.g.*, H.R. Rep. No. 787, *supra*, at 3 (agreeing with Judge Lynch, dissenting from denial of rehearing en banc, that the panel opinion "considered the definition of 'serious bodily injury' so narrowly that it produced a result 'wholly at odds with larger considerations of congressional *sentencing policy* and intent'") (emphasis added); 142 Cong. Rec. H10464 (daily ed. Sept. 17, 1996) (statement of Rep. Buyer, moving passage of the bill) ("This legislation does not create any new Federal crime * * *. It does not even create a penalty enhancement scheme under the carjacking statute—that enhancement already exists in the law. All this bill does i[s] make clear that anyone who commits rape during the course of a carjacking will get a longer * * * term in prison."); see also *id.* at H10463-H10465 (House debate and passage), S10892-S10893 (Senate floor statement and passage). The

President signed the Carjacking Correction Act into law on October 1, 1996. See 32 Weekly Comp. Pres. Doc. 1941.

Unlike the 1994 amendments on which petitioner seeks to rely, the 1996 Act "reflect[s] a[] direct focus by Congress upon the meaning of the earlier enacted provisions" of Section 2119 (see *Almendarez-Torres*, 118 S. Ct. at 1227), and specifically on the meaning of the term "serious bodily injury." Congress's discussion of that phrase, and of the operation of the carjacking statute, in reacting to the First Circuit's decision in *Rivera* make clear that Congress had no doubt that "serious bodily injury" was a factor relevant to the severity of sentencing, not an element of the carjacking offense. Thus, to the extent that evidence of later congressional views is relevant here, it supports the construction of Section 2119 adopted by the court below and other courts of appeals, not the construction urged by petitioner.

D. The Rule Of Lenity Does Not Support Adoption Of Petitioner's Construction Of Section 2119

Petitioner relies, finally, on the rule of lenity. Br. 30-31. It is by no means clear that defendants would be systematically favored by any construction of Section 2119 under which the government would be required to introduce at trial evidence concerning the seriousness of bodily injuries (or the fact of a death) resulting from the defendants' criminal conduct. Compare *Almendarez-Torres*, 118 S. Ct. at 1226 (noting that treating recidivism factor as an offense element would "risk[] unfairness" to defendants); *Monge* v. *California*, No. 97-6146 (June 26, 1998), slip op. 6 (observing that "fairness calls for defining a fact as a sentencing factor" where the fact could lead to an increased sentence, such as the quantity of drugs

involved in an offense, but the defendant might not wish to contest that fact while disputing guilt). In any event, as the Court has recently explained, the rule of lenity is not properly invoked simply because a statute requires consideration and interpretation to confirm its meaning. *Muscarello* v. *United States*, 118 S. Ct. 1911, 1919 (1998); see also *Caron* v. *United States*, 118 S. Ct. 2007, 2012 (1998) ("The rule of lenity is not invoked by a grammatical possibility."); *Moskal* v. *United States*, 498 U.S. 103, 107-108 (1990); cf. *Almendarez-Torres*, 118 S. Ct. at 1227-1228 (discussing doctrine of "constitutional doubt"). It applies only if there is such "grievous ambiguity or uncertainty" in a statute that, "after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Muscarello*, 118 S. Ct. at 1919 (internal quotation marks and ellipsis omitted). In this case, as we have demonstrated, consideration of the "language, structure, subject matter, context, and history" of Section 2119 makes it at least "reasonably clear" that the statute is best construed as establishing a single crime of carjacking, with three possible statutory sentencing ranges depending on the degree of harm resulting from the offense. See *Almendarez-Torres*, 118 S. Ct. at 1223-1224. The rule of lenity accordingly has no application here.

II. NOTHING IN THE CONSTITUTION REQUIRES THIS COURT TO OVERRIDE CONGRESS'S ESTABLISHMENT OF GRADUATED SENTENCING RANGES FOR A SINGLE CARJACKING OFFENSE

Petitioner contends (Br. 22-42) that, whatever Congress may have intended when it enacted Section 2119, "the Constitution requires that serious bodily injury be deemed an element [of a separate offense] in order for the defendant to be imprisoned in excess of the 15-year maximum penalty set forth in 18 U.S.C. §2119(1)." Pet. Br. 32; see also NACDL Br. 16-19. Nothing in the Constitution or this Court's cases, however, requires the Court to adopt a construction of Section 2119 other than that produced by applying the normal tools of statutory analysis.

A. The Court's Constitutional Analysis In *Almendarez-Torres* Controls The Decision In This Case

This Court "has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." *Monge*, slip op. 6. Thus, the Court recently declined to hold that a state scheme under which sentences would be doubled for repeat offenders necessarily defined an "offense" with a prior-conviction "element." *Ibid.* That decision relied on the Court's thorough analysis of the issue in *Almendarez-Torres*, 118 S. Ct. at 1228-1233, which upheld the use of prior criminal convictions as sentencing factors that could increase the maximum sentence authorized for a federal crime from two years to ten or twenty, and which similarly rejected the argument "that any significant increase in a statutory maximum sentence * * * trigger[s] a Constitutional 'elements' requirement" (*id.* at 1232).

Like petitioner (Br. 32-35), the defendant in *Almendarez-Torres* relied heavily on this Court's decision in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). The Court acknowledged that *Mullaney*, "[r]ead literally, * * * suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt." 118 S.

Ct. at 1229. In the light of subsequent decisions, however, the Court found it "absolutely clear that such a reading of *Mullaney* is wrong." *Ibid.* Indeed, the Court pointed out that *Patterson* v. *New York*, 432 U.S. 197 (1977), "suggests the exact opposite" proposition—*i.e.*, "that the Constitution requires scarcely any sentencing factors to be treated" as elements. 118 S. Ct. at 1229. As the Court explained, although *Patterson* facially resembled *Mullaney*, its result (unlike *Mullaney*'s) favored the State, the difference turning on whether or not *the State itself* had, in framing its criminal provisions, defined the factor in question as an element of the offense of conviction. *Almendarez-Torres*, 118 S. Ct. at 1229.

The Court then considered its most closely analogous precedent, *McMillan* v. *Pennsylvania*, which held that a State could use visible possession of a firearm in committing an offense as a sentencing factor requiring the imposition of a mandatory minimum sentence. *Almendarez-Torres*, 118 S. Ct. at 1230. The Court first catalogued "the various features of [*McMillan*] upon which the Court's conclusion [in that case] arguably turned": that the statute did not "transgress the limits expressly set out in *Patterson*" (*i.e.*, the State did not "presume" the existence of any factor it had defined as an element of the offense, or otherwise "relieve the prosecution of its burden of proving guilt," see *McMillan*, 477 U.S. at 86-87); that the defendant did not face "a differential in sentencing ranging from a nominal fine to a mandatory life sentence"; that the sentencing scheme "did not alte[r] the maximum penalty for the crime," but merely "limit[ed] the sentencing court's discretion in selecting a penalty within the range already available to it"; that the statute did not by its terms

create a separate offense; and that it "gave no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense," but "simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the precise weight to be given that factor." 118 S. Ct. at 1230 (internal quotation marks and ellipsis omitted); see also *McMillan*, 477 U.S. at 86-87 (discussing *Patterson*). The Court noted that, with regard to these features, the case before it differed from *McMillan* only in that it did "alter[] the maximum penalty for the crime," and "create[d] a wider range of appropriate punishments." *Ibid.*

Focusing its analysis on those differences, the Court concluded that they did not "change the constitutional outcome." *Almendarez-Torres*, 118 S. Ct. at 1230. First, the Court noted that the sentencing factor at issue—recidivism—was "a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Ibid.* Second, the Court pointed out that a statutory minimum sentence, like that at issue in *McMillan*, binds a sentencing judge, while an increased statutory maximum does not. Thus, "the risk of unfairness to a particular defendant is no less, and may well be greater, when a mandatory minimum sentence, rather than a permissive maximum sentence, is at issue." *Id.* at 1231. Third, the Court observed that the permissive sentencing range created by treating the recidivism provisions at issue to be sentencing factors was no broader than the ranges within which judges have traditionally exercised their discretion. *Id.* at 1231-1232. Finally, the Court again noted that the remaining *McMillan* factors supported the constitutionality

of the sentencing scheme at issue: "The relevant statutory provisions do not change a pre-existing definition of a well-established crime, nor is there any more reason here, than in *McMillan*, to think Congress intended to 'evade' the Constitution, either by 'presuming' guilt or [by] 'restructuring' the elements of an offense." *Ibid.* Accordingly, the Court rejected the claim that Congress could not constitutionally expand the range of sentences authorized for an offense without requiring the recidivism factor that triggered the enhancement to be charged and proved as a separate element of the underlying crime.

The Court's analysis in *Almendarez-Torres* applies equally to the constitutional question in this case.[15] As in both *Almendarez-Torres* and *McMillan*, the statute at issue here does not, by its terms, create multiple offenses. It likewise "creates no presumptions of [any] sort" in establishing the elements, and it does nothing to "relieve the prosecution of its burden of proving [the defendant's] guilt * * * of the [carjacking] crime for which he is to be punished." *McMillan*, 477 U.S. at 87; see *Almendarez-Torres*,

[15] The Court's decisions in *Almendarez-Torres* and *Monge* likewise preclude petitioner's attempt (Br. 42-43) to invoke the doctrine of "constitutional doubt" on the statutory construction question in this case. The Court declined to rely on that doctrine in *Almendarez-Torres* itself, 118 S. Ct. at 1227-1228, and there is no greater doubt concerning the constitutionality of the sentencing provisions at issue in this case. Indeed, in light of the holdings of *Almendarez-Torres* and *Monge* that recidivism *can* constitutionally be a sentencing factor that increases the maximum sentence to which a defendant is exposed, there is less reason here than in those cases to doubt that another traditional sentencing factor (resulting harm from an offense) can constitutionally do the same thing. Cf. *Almendarez-Torres*, 118 S. Ct. at 1238 (Scalia, J., dissenting) (noting that there is no "rational basis" for treating recidivism as an exceptional case).

118 S. Ct. at 1230, 1232; cf. *Montana* v. *Egelhoff*, 518 U.S. 37, 54-55 (1996) (plurality opinion). In framing the definition of armed carjacking in Section 2119, Congress did not "change a pre-existing definition of a well-established crime," or give any other indication that it was attempting to "'evade' the Constitution" by "'restructuring' the elements of an offense" so as to allow a sentencing "tail" to "wag[] the dog of the substantive offense." *Almendarez-Torres*, 118 S. Ct. at 1230, 1232; *McMillan*, 477 U.S. at 88; compare *Monge*, slip op. 2 (Scalia, J., dissenting).

As in *Almendarez-Torres*, there are also differences between Section 2119 and the sentencing scheme at issue in *McMillan*. But as in *Almendarez-Torres*, none of those differences changes the fundamental constitutional analysis.

B. The Range Of Available Sentences Under Section 2119 Is Not Unconstitutional

The sentencing factors set out in clauses (1)-(3) of Section 2119, like the enhancement provisions at issue in *Almendarez-Torres*, "create[] a wider range of appropriate punishments than did the statute in *McMillan*." 118 S. Ct. at 1230; see *McMillan*, 477 U.S. at 81-82 & n.2, 87-88. The overall sentencing range defined by Section 2119—up to life in prison—is also greater than that at issue in *Almendarez-Torres*, which involved a maximum sentence of 20 years' imprisonment. That difference is consistent, however, with the difference between unlawful reentry by a deported alien and carjacking, the latter being a violent crime that inherently involves the theft of valuable, easily transported property and poses a significant risk of serious bodily harm to its victims. Compare, *e.g.*, 18 U.S.C. 1201(a) (establishing sentencing range of "any term of years or * * * life"

for kidnapping, with mandatory life sentence or capital punishment "if the death of any person results").

The 15-year sentence authorized for any carjacking reflects the inherent seriousness of the crime. The second and third sentencing clauses increase that basic imprisonment range by about 66% in cases of bodily injury, or up to perhaps four times (for a young defendant) in cases where death results. The enhancements at issue in *Almendarez-Torres*, by contrast, increased an authorized maximum prison term of two years to ten or twenty years' imprisonment—a five- or ten-fold enhancement. See 118 S. Ct. at 1223-1224; see also *Monge*, slip op. 6. Finally, the discretion that a sentencing judge is authorized to exercise in imposing a sentence for carjacking is significantly constrained by the very statutory sentencing factors that are at issue here (resulting bodily injury or death), and further channelled by the applicable federal Sentencing Guidelines. See Guidelines § 2B3.1. Under these circumstances, the overall sentencing range authorized by Section 2119 creates no "significantly greater [risk of] unfairness" than the sentencing provisions at issue in *Almendarez-Torres* or *McMillan*, and its mere breadth cannot justify a different constitutional result.

C. The Traditional Sentencing Factors At Issue In This Case Are Not Constitutionally Different From The Recidivism Factor At Issue In *Almendarez-Torres*

Petitioner seeks to distinguish *Almendarez-Torres* on the ground that the recidivism factor involved in that case is constitutionally different from resulting injury or death. Br. 38-40; see also *Monge*,

slip op. 5 (Scalia, J., dissenting). Although plainly important to the Court's analysis, however, the specific subject matter was not, as petitioner argues (Br. 38), "the critical reason" for the Court's decision in *Almendarez-Torres*, and the reasoning of that decision applies equally to the resulting-injury factor at issue here.

First, as discussed above (see pages 23-25, *supra*), the degree of harm inflicted on victims—and, in particular, the infliction of serious or fatal bodily injury—is, like recidivism, "as typical a sentencing factor as one might imagine." See *Almendarez-Torres*, 118 S. Ct. at 1224. While victim injury may certainly be made an element of an offense, petitioner cannot seriously dispute that there is also nothing in the least unusual about using it as a factor in determining the appropriate severity of a defendant's sentence. The traditional nature of the subject matter therefore provides no basis for distinguishing between resulting injury and recidivism for purposes of *Almendarez-Torres*'s constitutional analysis.

Petitioner also renews (Br. 32, 38-40), in the constitutional context, his statutory argument that resulting injury differs from recidivism because it is "a fact of an offense" rather than "a characteristic of the offender." That argument for a constitutional distinction, and the related argument that resulting injury may require more factfinding than criminal history, are unpersuasive for reasons that we have already discussed. See pages 25-27, *supra*; *McMillan*, 477 U.S. at 92 (rejecting argument that the government was required to prove visible possession of a firearm by more than a preponderance of the evidence because it was "a fact concerning the crime committed rather than the background or character of the defendant")

(internal quotation marks omitted). Nor is there merit in petitioner's suggestion (Br. 39-40) that the admission at trial of evidence relating to resulting injury or death would pose less risk of prejudice to the defendant than the admission of evidence of recidivism. Whether that is true depends largely on whether the same evidence would be admissible for some purpose other than determining the appropriate sentencing range (such as, in a carjacking case, to show the use of "force and violence"). *Almendarez-Torres* itself did not discuss possible prejudice to the defendant as part of its constitutional analysis (compare 118 S. Ct. at 1226 with *id.* at 1228-1233). By contrast, when the Court most recently adverted to the issue of possible prejudice, it commented that the avoidance of such prejudice formed one of the reasons for rejecting "an absolute rule that a [maximum-sentence-increasing] enhancement constitutes an element of the offense"; and it illustrated that point with an example involving, not recidivism, but the quantity of controlled substances involved in a drug offense—a fact intimately related to the circumstances of the crime. *Monge*, slip op. 6.

In any event, nothing in *Almendarez-Torres*'s constitutional analysis turns on the distinction between criminal history and the circumstances of the offense. See 118 S. Ct. at 1228-1233. To the contrary, in refusing to adopt a constitutional rule that any factor that increases the maximum authorized penalty should be treated as an element of the offense, the Court noted that any such principle "would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty." 118 S. Ct. at 1232. Those factors are, of course, often

ones that relate closely to "the circumstances of the offense" (Pet. Br. 38). See, *e.g.*, *Walton* v. *Arizona*, 497 U.S. 639, 645 (1990) (findings included that murder was committed "in an especially heinous, cruel, or depraved manner" and for pecuniary gain); *Hildwin* v. *Florida*, 490 U.S. 638, 639 (1989) (per curiam) (similar); *Spaziano* v. *Florida*, 468 U.S. 447, 452 (1984) (similar).

D. Constitutional Values Provide No Reason For Treating Any Factor That Increases The Maximum Statutory Penalty Based On A Crime's Consequences As An Element Of The Offense

The "major difference" between the statute before the Court in *Almendarez-Torres* and the statute approved in *McMillan* was that the existence of a statutory sentencing factor under 8 U.S.C. 1326(b) "trigger[ed] an increase in the maximum permissive sentence, while the sentencing factor at issue in *McMillan* triggered a mandatory minimum sentence." 118 S. Ct. at 1231. The same distinction applies in this case as well. But just as in *Almendarez-Torres*, the difference between a permissive maximum and a mandatory minimum sentence "does not systematically, or normally, work to the disadvantage of a criminal defendant." *Ibid.* There is, correspondingly, no more reason here than in *Almendarez-Torres* to hold that the minimum/maximum distinction makes any constitutional difference. *Ibid.*; see also *Monge*, slip op. 6.

Whether a particular factor "alters the maximum penalty for the crime committed" (*McMillan*, 477 U.S. at 87-88), "triggers an increase in the maximum permissive sentence" (*Almendarez-Torres*, 118 S. Ct. at 1231), or "increases the maximum sentence to which a defendant is exposed" (*Monge*, slip op. 6) can-

not by itself provide a sound constitutional standard for determining whether that factor must be treated as an element of the offense of conviction. On its face, any such standard would reproduce the "literal[]" reading of *Mullaney* that *Almendarez-Torres* "absolutely" rejected. 118 S. Ct. at 1229; compare Pet. Br. 25-26. Any rule that Congress cannot prescribe subsidiary metes and bounds within an overall statutory sentencing range—as opposed to allowing judges to set any such intermediate limits in their own discretion—would render application of the mandatory federal Sentencing Guidelines unconstitutional, unless every factor taken into account in setting a defendant's Guidelines range were charged in the indictment and proved beyond a reasonable doubt at trial. See 18 U.S.C. 3553(b) (use of Guidelines ranges mandatory except for limited departure power); *United States* v. *R. L. C.*, 503 U.S. 291, 297-298, 306 (1992) (noting that Congress's sentencing directions are expressed through the work of the Sentencing Commission, as well as through other criminal statutes, and interpreting the phrase "maximum term of imprisonment * * * authorized" for juvenile offenders under 18 U.S.C. 5037(c) to be the maximum sentence under the Guidelines, not the statutory maximum); cf. *Miller* v. *Florida*, 482 U.S. at 432-435 (provisions of state sentencing guidelines sufficiently substantive for changes to invoke protection of Ex Post Facto Clause). Yet under this Court's decisions, that is incorrect. See, *e.g.*, *Edwards* v. *United States*, 118 S. Ct. 1475, 1477 (1998) (Guidelines instruct "*the judge* * * * to determine" type and quantity of drugs for which defendant is accountable "and then to impose a sentence that varies depending upon amount and kind"); *Watts*, *supra*; *Witte*, *supra*; cf. *Almen-*

darez-Torres, 118 S. Ct. at 1232 (discussing "existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty, a punishment far more severe than that faced by petitioner here").

Petitioner does not take his argument to that logical but legally untenable conclusion. He does argue, however, that clause (1) of Section 2119 sets a "statutory maximum sentence" for his offense of 15 years' imprisonment. Pet. Br. 41. Even on the assumption that Congress clearly intended resulting injury or death to be treated as sentencing factors, not elements, he contends that the "statutory maximum" defined in clause (1) may not constitutionally be varied by clause (2) or (3) of the same Section, unless the factors they designate were charged in the indictment and proved at trial. *Id.* at 32, 41-42; see also NACDL Br. 17-19. But there is no sound reason, under the Constitution, to distinguish Section 2119 from a statute that sets a maximum penalty of life imprisonment for carjacking, subject to implementation under mandatory guidelines (promulgated by the Sentencing Commission) that establish escalating sentencing ranges based on whether the offense resulted in no serious injury, serious bodily injury, or death. Such a statute would satisfy the letter of petitioner's proposed standard that all conduct-related facts that bear on the "statutory maximum" must be "proven beyond a reasonable doubt at a trial by jury." Pet. Br. 32. But it would still leave the sentencing judge with the role of making significant findings about the facts relating to "the circumstance[s] of a crime," *id.* at 40, and increasing the punishment accordingly. A constitutional rule that prohibits the *direct* statutory guidance found in Sec-

tion 2119, but endorses broad statutory sentencing ranges for a defined crime subject to intermediate binding sub-ranges promulgated by a guidelines-issuing agency, protects no basic constitutional value. Compare *McMillan*, 477 U.S. at 92 ("We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance."); *Chapman* v. *United States*, 500 U.S. 453 (1991) ("Congress has the power to define criminal punishments without giving the courts any sentencing discretion.").

This is not to say that the Constitution places no limit on Congress's ability to define criminal offenses; indeed, this Court has explicitly indicated to the contrary. See, *e.g.*, *McMillan*, 477 U.S. at 86; *Monge*, slip op. 6 ("One could imagine circumstances in which fundamental fairness would require that a particular fact be treated as an element of the offense."). Beyond explicit restrictions such as the Ex Post Facto Clause (U.S. Const., Art. I, § 9, Cl. 3), and limits that follow from individual constitutional rights (*e.g.*, *United States* v. *Eichman*, 496 U.S. 310 (1990)), the Court has been alert to the possibility that a legislature might "change a pre-existing definition of a well-established crime" (118 S. Ct. at 1232), departing from the pattern of a traditional offense in a manner that would "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202; *Egelhoff*, 518 U.S. at 58-59 (Ginsburg, J., concurring in the judgment); *McMillan*, 477 U.S. at 88. Other principles, such as the Eighth Amendment's requirement of proportionality, or the requirement that a criminal law give fair notice of the

conduct it prohibits, might also apply to check hypothetical attempts at legislative evasion. See, *e.g.*, *Monge*, slip op. 2 (Scalia, J., dissenting) (all-purpose criminal prohibition of "knowingly causing injury to another," supplemented by extensive "sentencing factors" strongly resembling traditional offense elements). On a somewhat different point, the Court has also reserved the question whether some heightened degree of procedural protection might apply to the proof, at sentencing, of facts on which a judge bases a particularly dramatic increase in sentence (whether or not that increase is dictated by a statute or sentencing guideline). See *Almendarez-Torres*, 118 S. Ct. at 1233; *Watts*, 117 S. Ct. at 637-638 & n.2.

Any of these possible constitutional protections against legislative abuse of the criminal process must be applied with restraint, lest it interfere unduly with the traditional, and wholly legitimate, prerogative of the States and Congress to define both what constitutes criminal conduct and how that conduct, once established, is to be punished. Nothing in this case, however, requires the Court to address the outer constitutional boundaries of legislative power. Section 2119 supplies a clear definition of a serious criminal offense and specifies an overall sentencing range, subdivided into intermediate ranges that apply based on whether the court finds that serious bodily injury or death resulted from the defendant's commission of the crime. The crime itself is a variation on the traditional robbery offense, and the sentencing factors, also typical ones in the law, are reasonably related to penalties that reflect increased resulting harms. The statute gives fair notice of the conduct it prohibits and the penalties at issue, and there can be no claim here that petitioner lacked notice of the charges

against him at trial or of the facts in issue at sentencing. Because nothing in the Due Process Clause or any other provision of the Constitution requires that every factor relevant to such sentencing determinations be charged in the indictment or proved at trial, the statutory scheme under which petitioner was sentenced is constitutional.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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